REVIEW ESSAYS

Why Is This Rights Talk Different from All Other Rights Talk? Demoting the Court and Reimagining the Constitution

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THE PARTIAL CONSTITUTION. By Cass R. Sunstein.† Cambridge, Mass.: Harvard University Press. 1993. 414 pp. $35.00.

In The Partial Constitution, *Cass R. Sunstein argues that mainstream constitutional theory renders the Constitution "partial" by treating the Supreme Court as the only important interpreter and by accepting the status quo as uncontroversial. In this review essay, Professor Forbath suggests that Sunstein's critique is brilliant—but that Sunstein shies away from the full implications of an affirmative constitutionalism that speaks to citizens and elected bodies no less than to courts. Arguing that Sunstein's proposals thus seem unequal to his democratizing goals, Professor Forbath suggests that the American tradition of democratic constitutionalism has much to teach contemporary scholars about the distinctive problems and possibilities of a non-court-bound rights discourse. Tracing strands of this non-court-centered tradition from Reconstruction through the New Deal, he argues that it can help recast the constitutional links between racial and economic justice and can inform arguments for such departures from the status quo as decent work and income for all, as well as workplace democracy.*

For years, many of the nation's best liberal and progressive constitutional scholars have developed arguments they know the Supreme Court will not embrace. These scholars say the Constitution demands profound social reforms—decent education, housing, and health care; freedom from poverty; campaign finance reform; and protection from domestic violence.[1] The Court plainly dis-

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1. *See, e.g.*, KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION (1989) [hereinafter KARST, BELONGING TO AMERICA] (arguing for constitutional rights to subsistence and an end to chronic urban unemployment); Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimum Entitlements*, 13 HARV. J.L. & PUB. POL'Y 37 (1990) [hereinafter Amar, *Forty Acres and a Mule*] (arguing for a right to minimum entitlements); Akhil Reed Amar &

agrees, yet the books and articles keep on coming. To whom are they addressed? There is a familiar, sober answer: *We write for one another primarily, for other legal academics; and for our students, who will be the judges and constitutional lawyers of tomorrow. We highlight the shortcomings of constitutional doctrine in the present Court's hands and keep alternate understandings alive for another day and a different Court.*

Clearly, this response describes an important task. But as the federal judiciary continues roughly on the course set in the 1980s, resuming its historic role as a largely conservative, sometimes reactionary force in American life, perhaps progressive constitutional thinkers can do more.

The Constitution, after all, was not written solely for courts to interpret, nor does it mean only what judges say it means. On the contrary, the Constitution often has been the terrain for broad public debates. And until relatively recently, neither popular nor scholarly discussion of constitutional matters focused so narrowly on judicial doctrine. For most of United States history, when politicians, reformers—and scholars—debated the meaning of the Constitution, they far more often addressed the citizenry and the legislatures than the courts.

With *The Partial Constitution*, Cass Sunstein joins a number of constitutional scholars who have begun to reclaim this broader ground.[2] Sunstein rejects the idea that the Court is the sole significant source of constitutional interpretation and innovation, and turns toward other actors, institutions, and "democratic arenas generally."[3]

Daniel Widawsky, *Child Abuse As Slavery: A Thirteenth Amendment Response to* DeShaney, 105 HARV. L. REV. 1359 (1992) (arguing for a constitutional right to protection against child abuse); Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood,* 86 COLUM. L. REV. 1103 (1986) (arguing for a right to a decent living); Paul Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism,* 97 YALE L.J. 1623 (1988) (arguing for rights to economic equality, campaign reform, and workplace democracy); Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor,* 39 HASTINGS L.J. 1 (1987) (arguing for a right to subsistence income); Thomas C. Grey, *Property and Need: The Welfare State and Theories of Distributive Justice,* 28 STAN. L. REV. 877 (1976) (arguing for a right to basic material needs); Kenneth L. Karst, *Citizenship, Race, and Marginality,* 30 WM. & MARY L. REV. 1 (1988) [hereinafter Karst, *Citizenship, Race, and Marginality*] (arguing for rights to food, housing, education, jobs, and training); Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment,* 91 HARV. L. REV. 1 (1977) (arguing for rights to subsistence and employment); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls'* Theory of Justice, 121 U. PA. L. REV. 962 (1973) (arguing for rights to subsistence, shelter, education, and health care); Frank I. Michelman, *The Supreme Court Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment,* 83 HARV. L. REV. 7 (1969) [hereinafter Michelman, *On Protecting the Poor*] (same); Frank I. Michelman, *Welfare Rights in a Constitutional Democracy,* 1979 WASH. U. L.Q. 659 [hereinafter Michelman, *Welfare Rights*] (same); Laurence H. Tribe, *Unraveling* National League of Cities: *The New Federalism and Affirmative Rights to Essential Government Services,* 90 HARV. L. REV. 1065 (1977) (predicting the rise of rights to security, housing, health care, employment, and education); Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment,* 94 W. VA. L. REV. 111 (1991) (exploring the possibility of rights to police protection and against extreme deprivation).

2. *See, e.g.,* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); ROBERT A. BURT, THE CONSTITUTION IN CONFLICT (1992); KARST, BELONGING TO AMERICA, *supra* note 1; Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation,* 27 STAN. L. REV. 585 (1975); Paul Brest, *Constitutional Citizenship,* 34 CLEV. ST. L. REV. 175 (1989); Brest, *supra* note 1; Robin West, *Progressive and Conservative Constitutionalism,* 88 MICH. L. REV. 641 (1990); West, *supra* note 1.

3. P. 10.

This is a daunting enterprise. Constitutional theory melds normative and practical insights and arguments. And even as scholars' normative arguments range increasingly far from Court doctrine, their practical analyses remain centered on the strengths and weaknesses of the judiciary as an architect and regulator of relations among individuals, groups, and institutions. Today, then, to shift one's focus away from the courts is almost to begin constitutional theory anew. What does Sunstein contribute toward launching this new enterprise? And what promise does this new constitutionalism hold? In an era when rights talk meets with skepticism from all sides, readers may well ask: Why is this rights talk different from all other rights talk? Does it offer hope for reinvigorating the vocabulary of reform?

I think this new constitutionalism may offer such hope, by overcoming some of the key shortcomings of contemporary rights-based politics and rhetoric. But Sunstein's work does not entirely fit the bill. In Part I, I describe Sunstein's book, which sets forth a brilliant critique of the one-sidedness of contemporary constitutional doctrine and gathers together certain indispensable conceptual tools for a non-court-centered brand of constitutional argument, but proves, finally, to be more a call for such thinking than a sustained example of it. Sunstein fails to finish his undertaking, I suggest, less because it is arduous—for he has enormous energy and breadth equal to the task—than because he is deeply ambivalent about the very democratic constitutionalism he hopes to revive.

Sunstein professes strong democratic commitments—not only to enhanced deliberative processes, but to a robust conception of political equality, to broad participation by the citizenry, and to an expanded domain for democratic governance. Indeed, these are key principles of Sunstein's "post-New Deal Constitution," and he analyzes and assails how present understandings and practices shortchange them. But Sunstein remains wedded to much of what he attacks. Having grasped the ideological blinkers and institutional constraints that confine contemporary constitutional discourse, Sunstein nonetheless never strays far from the center precincts of that discourse. He barely explores the quite different dilemmas and possibilities of a non-court-centered constitutionalism oriented toward democratic values and fora. As a consequence, the reforms Sunstein proposes seem unequal to the tasks he sets for them.

In Part II, I argue that Sunstein might have learned a great deal about the distinctive problems and possibilities of a non-court-bound constitutional discourse by examining the rich American tradition of democratic constitutionalism. Sunstein often gestures toward this tradition. But he inadvertently makes this history over in his own image, leeching out much of its radicalism and claiming the tradition supports initiatives no bolder than those he embraces.

Most disconcerting is Sunstein's treatment of "positive" social and economic rights. He embraces them, but only within a disenchanted and compromised version of 1970s attempts to constitutionalize minimum welfare entitlements, not as part of an effort to put social and economic citizenship on a more persuasive democratic footing. Sunstein carries forward a court-centered

conception of positive rights as being solely for the very poor—conceived as a racially identified and stigmatized "discrete and insular minority."[4] But unlike previous champions, Sunstein opposes judicial recognition of these minority rights. In the name of democracy, he relegates them to the tender mercies of majoritarian politics.

I argue that here, Sunstein fails to connect with the main currents of the past, the chief problems of the present, or the real possibilities of the future. I aim to show that constitutional history and traditions in fact supply stronger support for a broad conception of social and economic citizenship—encompassing decent work, social provision, and a measure of economic democracy—than they do for the narrower welfare-entitlements outlook that Sunstein halfheartedly champions.

Sunstein wisely urges us to rely less on constitutional adjudication and more on constitutional politics. But he recoils from the democratic vistas such a politics entails. By contrast, the broader conception of equal citizenship sketched in Part II is a better choice not only for hermeneutic and historical reasons; it also is a better wager in contemporary politics. By recasting the forgotten constitutional links between racial justice for minorities and economic justice for all, this alternate outlook may go some way toward renewing and deepening the bases for common identity and cooperation among groups of poor and working Americans that today's rights talk often only divides.

I. SUNSTEIN'S PARTIAL CONSTITUTION

To Sunstein, the present-day Constitution is "partial" in two ways: because contemporary constitutional doctrine treats the status quo as neutral and just, and because we tend to enshrine the Court's interpretations and slight all others.[5]

A. *Status Quo Neutrality*

A key principle of constitutional law is that government cannot play favorites; it must treat people impartially. When the government does favor one group over another, it must have a good, public-regarding reason for doing so or become vulnerable to constitutional attack—to claims by the disfavored group that the basic norm of neutrality has been violated. In considering these claims, however, courts inevitably make background or "baseline" assumptions that dramatically affect the outcomes of many cases. If one sees existing distributions of power, wealth, and authority as fair, or, if unfair, at least natural, then the government acts "neutrally" when it leaves those distributions undisturbed. Interference with the status quo tends to appear partisan. The Supreme

4. *See* United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938); *see also* text accompanying notes 58-69 *infra.*

5. *See, e.g., Preface;* pp. v-vi, 9-10.

Court employed this reasoning during the late nineteenth and early twentieth centuries to strike down labor legislation and other social reforms.[6]

Sunstein dubs this understanding of government neutrality "status quo neutrality."[7] FDR and the New Dealers he appointed to the Court are credited with sweeping this style of reasoning into the dustbin of history. The Legal Realists waged a brilliant campaign to undermine the foundations of "Lochnerism." In one area of law after another, they demonstrated that no distribution of resources and opportunities is ever natural; instead, every such distribution is necessarily a product of legal rules and entitlements. Thus, there is no such thing as a "free market"; there are only competing possible regulatory regimes. Statutory reforms do not bring government into "private" spheres because those spheres are *always* products of government.

The *Lochner*-era courts often defended a regime of judge-made rules and common law entitlements against competing regimes fashioned by Congress and state legislatures. But the judge-made rules were no more "natural," and by many contemporary lights were a good deal less fair, than the laws the courts struck down.

Half a century has passed since the New Dealers brought the Realist outlook to the federal bench, but in refurbished form "status quo neutrality" remains alive and well. The Realist lamp has dimmed, the bench's tendency to view the status quo as natural persists, and Sunstein brilliantly illuminates how "status quo neutrality" remains dispositive in crucial constitutional questions.

Consider, for example, *Harris v. McRae*,[8] in which the Supreme Court upheld the Hyde Amendment, denying poor women Medicaid funding for medically necessary abortions. A key question in that case was whether the Hyde Amendment resulted in a "mere" failure to fund or a "penalty" on the exercise of the constitutional right to choose to have an abortion. To answer that question, Sunstein, like Kathleen Sullivan and others,[9] points out, we need a baseline. "We do not know whether something is a penalty unless we decide about

6. The locus classicus is, of course, Lochner v. New York, 198 U.S. 45 (1905). There, the Court voided a maximum hours law, reasoning that the law favored workers over employers by interfering with the natural workings of the market and the freedom of contract both groups otherwise enjoyed. *Id.* at 61.

7. Pp. 3-7. This critical approach, highlighting the role of courts' "baseline" assumptions, was pioneered by the Legal Realists and revived by such critical legal scholars as Duncan Kennedy. *See, e.g.*, Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981) (arguing that efficiency arguments for assignment of legal entitlements are incoherent because the choice of an appropriate baseline is arbitrary). For a historical discussion of the baseline approach, see Jack M. Beermann & Joseph William Singer, *Baseline Questions in Legal Reasoning: The Example of Property in Jobs*, 23 GA. L. REV. 911 (1989).

8. 488 U.S. 297 (1980).

9. *See* Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1436 (1989) (arguing for the abandonment of penalty analysis); *see also* Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1351-78 (1984) (deriving general "penalty" baselines based on history, equality, and prediction). *But see* Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989, 1001-05, 1015-17 (1991) (offering definitions of "penalty" as either funding a direct substitute or making someone "worse off" than if they had not exercised their right).

the world that would exist 'otherwise' "[10]—in this case, without the asserted penalty.

Opponents of the Hyde Amendment pointed out that Medicaid did fund pregnancy- and childbirth-related expenses. Yet the Court concluded that the appropriate baseline is a world without the Medicaid program; so the denial of abortions was a mere failure to fund. Lack of access to this constitutional right was not the government's fault. To the Court, in the "natural" world, poverty and health care markets are "simply 'there.' "[11]

But Sunstein reminds us that the distribution of wealth and poverty in the Court's natural world is no less a product of law than is Medicaid. It is a product chiefly of the judge-made law of property, "which, perversely, is not treated as law at all."[12] The New Deal constitutional revolutionaries sought to strip away the "natural" veneer of the common law and to establish that legislation was as fundamental a part of modern society as common law entitlements. Therefore, Sunstein argues, "the post-New Deal baseline is a system in which poor citizens generally are reimbursed for medical services, and the denial [of funds for abortions] is really a penalty."[13] The institution of universal health care coverage might bring about such a reevaluation of baselines. In the meantime, *Harris* stands as a "close cousin of *Lochner*."[14]

And *Lochner* has many other cousins. Drawing on his own earlier work and a rich body of critical scholarship, Sunstein canvasses how status quo neutrality has shaped courts' understandings of race and gender discrimination and even their views on whether government is involved in a case, and thus answerable to the Constitution at all. In the end, Sunstein concludes, judges may cling to status quo baselines largely because of their underlying conception of what it means to do justice.

Classically, justice in the courtroom has meant adjudicating a particular case between plaintiff A and defendant B and compensating A if she proves an injury caused by B. The traditional ideal of adjudicatory justice, as Robin West has pointed out, is to restore, not to transform.[15] Thus, plaintiff's injury must be sharply defined in time and space, and plaintiff has to show clearly that defendant caused it; she loses if some third party or "society" generally was the cause. Likewise, in the traditional understanding, remedies do not result in any

10. P. 86.

11. P. 70.

12. P. 71.

13. P. 86.

14. P. 86. Elsewhere in the book, Sunstein acknowledges that the constitutional question of publicly funded abortions is more complex than this baseline analysis might suggest. Sunstein holds that the Constitution only forbids the denial of funding for medically necessary abortions, and in cases of rape and incest. For although any refusal to fund abortion may look like a "penalty," Sunstein says the critique of status quo neutrality and common law baselines requires that we put aside the notion that such conclusory labels can decide cases like *Harris*. Instead, we must confront directly the question how far we should burden poor women in this context in the name of other citizens' moral beliefs. Pp. 291-318. Surprisingly, Sunstein never really explains why he draws the line as he does. He merely states that refusing to fund abortions that are medically necessary or in cases of rape and incest goes too far. P. 317.

15. *See* West, *supra* note 2, at 714-15.

social reordering, but restore the status quo ante. Sunstein notes that this model describes the ideal type of a case resting on the common law of tort, contract, or property. It is ill-suited, however, to much of constitutional law and to other areas of public and private law in which the relevant harm is often systemic and cannot be sharply defined or traced to a single wrongdoer. In these cases, causation may be as tangled as history itself, and, as Sunstein shrewdly notes, the notion of restoring the status quo ante may be incoherent, since the status quo may be the source of injury.[16] All of this explains why much reform legislation—dealing, for example, with poverty and discrimination, environmental degradation and occupational injury—has sought to displace the courts and their traditional methods of doing justice, in favor of administrative procedures and broader participation by affected citizens. Yet the courts have insisted on interpreting this very legislation, as well as the Constitution itself, in a fashion that reasserts the primacy of traditional adjudication.[17]

B. *An Elusive Alternative Model*

How, then, should "We the People" and our representatives in Congress and elsewhere proceed with the business of constitutional argument, interpretation, and reform unfettered by judicial models and biases? Sunstein never fully addresses this question. While his critiques are detailed, his prescriptions are abstract and surprisingly thin.

Sunstein develops a number of arguments about why the judiciary should welcome constitutional innovations by Congress. He suggests, for example, that courts should construe liberally statutes aimed at providing equality of opportunity in public education.[18] But he still addresses his central arguments to the courts. Sunstein offers little insight about constitutional arguments actually addressed to Congress and other "democratic arenas," or about how such a shift in audience would alter constitutional theory.

Presumably, a non-court-centered constitutional theory would continue to meld normative and practical concerns, but, as Sunstein repeatedly underscores, the latter would no longer revolve around the capacities and limitations of the courts. Ironically, however, Sunstein's focus lies precisely there. For example, he has a great to deal say about why the judiciary would be unwise to recognize and unable to administer a constitutional right to subsistence or other rights that entail broad social reforms. His arguments are familiar staples of conservative constitutional scholarship since the 1970s; they include the courts' lack of

16. Pp. 320-21.

17. P. 333. The contrast between traditional and institutional models of adjudication is a major theme in such classic works of metaprocedure as ROBERT M. COVER & OWEN M. FISS, THE STRUCTURE OF PROCEDURE (1979); ROBERT M. COVER, OWEN M. FISS & JUDITH RESNIK, PROCEDURE (1988); and Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). For a historical perspective on this contrast, see Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980).

18. Pp. 157-58.

"democratic pedigree,"[19] as well as their lack of expertise and inability to assess tradeoffs among desirable goals.[20]

Yet despite these criticisms of the courts as engines of reform, Sunstein, unlike the conservative scholars whom he echoes, actually believes in these rights. One, therefore, would expect him to concentrate on beginning to imagine how normative and practical precepts might interact in constitutional arguments promoting such rights in nonjudicial arenas.[21] But no: He merely warns that judicial recognition of social rights might preempt "democratic deliberation" and "democratic efforts" to secure them.[22] The outlines of these endangered democratic processes, however, remain vague.

C. *Repairing Democratic Deliberation—Modest Proposals*

This is surprising, because for Sunstein democratic deliberation is the Constitution's core value. Indeed, Sunstein introduced constitutional scholars to the evocative and now widely used phrase "deliberative democracy" to express his understanding of the Framers' key republican ideal.[23] In his view, the Framers aimed to create a system that combined political accountability with a large measure of public deliberation.[24]

Over two centuries, the scope of these constitutive commitments has expanded: The citizenry to whom government is accountable now includes most of the population; and the subject matter for democratic scrutiny now encompasses every aspect of the status quo—distributions of goods, power, and privilege in every domain. Moreover, Sunstein insists, "respect for existing distributions [must] depend on the reasons that can be brought forward on their behalf."[25] And the principle of deliberation requires more than earnest debate in Congress; it requires "widespread participation by the citizenry."[26] To the extent such participation is lacking, and the legal-institutional order insulates aspects of the status quo from active public scrutiny, our system of government betrays the Constitution.[27]

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19. P. 341.

20. Pp. 147-49, 155.

21. For suggestive observations along these lines, see West, *supra* note 2, at 716-21. Historical precedents are also illuminating. For example, the meld of sociological, economic, and constitutional discourse that characterized Jeffersonian political economy addressed its arguments to legislatures and other state actors, not courts. *See* DREW R. MCCOY, THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA (1980). The richest and most apposite example, in view of Sunstein's democratic ideals, may be the late 19th century Populist and early 20th century Progressive literatures calling for the democratization of a range of institutions in book-length arguments interweaving constitutional, sociological, and political-economic ideas. *See* notes 107-146 *infra* and accompanying text.

22. P. 149.

23. *See* Cass R. Sunstein, *Interest Groups and American Public Law*, 38 STAN. L. REV. 29, 45 (1985) (citing Joseph M. Bessette, *Deliberative Democracy: The Majority Principle in Republican Government*, *in* HOW DEMOCRATIC IS THE CONSTITUTION? 102 (Robert A. Goldwin & William A. Schambra eds., 1980)).

24. Pp. 134-35.

25. P. 60.

26. P. 135.

27. P. 135.

By this standard, it is hard to dispute that American democracy seems constitutionally out of order, and Sunstein outlines some repairs. There is a gulf, however, to which we shall return, between the scope of these repairs and the extent of the problem, as Sunstein would have us gauge it.

First, though, the repairs: Most developed is Sunstein's agenda for the broadcast media and the First Amendment. If the First Amendment fundamentally promotes democratic self-government, Sunstein suggests, then a First Amendment warning light should flash over government-chartered concentrations of power over the means of public discourse, at least if broadcasters fail to air a broad range of views on public issues.

Few would contend that local television news succeeds along these lines; it is an endless procession of stories about murders, fires, plane crashes, and entertainment.[28] Yet efforts to require broadcast licensees to devote time to issues of public importance or to diverse views are seldom applauded as furthering First Amendment values. Rather, they are attacked as violations of the First Amendment.[29]

This is because, Sunstein argues, the baseline assumptions of free speech doctrine are thoroughly pre-New Deal. Through a combination of statutory and common law, government grants mass-media corporations the right to dominate crucial spheres of communication. But conventional First Amendment analysis does not address this as a governmental grant of power. Instead, it regards the broadcasters as purely "private."[30]

Likewise, conventional analysts see support for markets in advertising and programming as neutral on government's part, rather than as a collective choice about regulating access to the public airwaves. Against this baseline, media markets and the practices of broadcasters seem to raise no constitutional issues, whereas efforts to enhance broadcast quality or diversity seem to be "government intervention" where none existed before. Under Sunstein's "New Deal for Speech," by contrast, "many imaginable interferences with the autonomy of broadcasters are not 'abridgements' of free speech," and many existing "private" arrangements may impermissibly restrict free expression.[31]

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28. Pp. 215-16 (citing PHYLLIS KANISS, MAKING LOCAL NEWS 110 (1991)).

29. In fact, Sunstein notes, the Federal Communications Commission has stated that such requirements violate the First Amendment. P. 213 (citing Syracuse Peace Council, 2 F.C.C.R. 5043, 5055 (1987)). *See generally* LUCAS A. POWE, AMERICAN BROADCASTING AND THE FIRST AMENDMENT (1987) (arguing that current broadcast regulations amount to censorship).

30. Pp. 203-13.

31. P. 202; *see also* pp. 218-23 (proposing a set of regulatory measures that would "promote rather than undermine 'the freedom of speech' "). For a vigorous earlier version of this argument, see Owen M. Fiss, *Free Speech and Social Structure,* 71 IOWA L. REV. 1405 (1986). For insightful criticism of Fiss' and Sunstein's views, see Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse,* 64 U. COLO. L. REV. 1109, 1120-36 (1992).

Sunstein argues similarly, though more tentatively, for reconsideration of the First Amendment doctrine applied by the Court in Buckley v. Valeo, 424 U.S. 1, 12-59 (1976) (per curiam), to overturn campaign spending limits. For Sunstein, as for others, *Buckley* is the present-day *Lochner,* "a decision to take the market status quo as pre-political, and use of that decision to invalidate democratic efforts at reform." P. 223. Efforts to prevent economic inequalities from becoming political ones, he argues, "should not be seen as impermissible redistribution or as the introduction of government regulation into

Sunstein, it should be noted, is hardly a heedless champion of state-run television. He acknowledges that his "New Deal" would entail significant risks because, unlike today, government would control some of the content of broadcasting. He weighs the risks of change against the costs of the status quo and concludes that the latter pose graver obstacles to free expression. Sunstein urges experiments aimed at restructuring and supplementing the present market order to promote better programming. Indeed, he calls such an effort a constitutional duty—but one for legislatures, not courts, because of the latter's institutional limitations.[32]

This is Sunstein at his best, skillfully combining the three main elements of his theory. He overcomes the bias toward the status quo by urging a "New Deal for Speech." He addresses the bias toward the Court by arguing that Congress may be better suited to developing and enforcing innovative interpretations of the First Amendment for mass media. Finally, he suggests a substantive reform that goes some way toward making good on the Constitution's commitment to public deliberation among political equals.

D. *Sunstein's Own Partiality*

The Partial Constitution, then, is a signal achievement. Clearly written, it synthesizes Sunstein's own thought with much of the best work of other liberal and progressive constitutional scholars to reveal the "partiality" of current doctrine and to break ground for a more democratic and less court-centered constitutionalism. Developing such a constitutionalism is a project for many, not one, and dwelling further on the book's shortcomings risks churlishness. But Sunstein aims high; thus, it seems fair to note some partialities of his own, partialities that seem to stem from an ambivalence toward the democratic constitutionalism he hopes to revive.

An evident tension runs through Sunstein's account of "deliberative democracy." Despite his abstract commitment to broad participation, Sunstein seems to share some of the Framers' deep distrust of ordinary citizens and their belief that an autonomous legislature composed of the "better sort" of people is more likely to make virtuous, public-regarding decisions than the public themselves.[33] As Jefferson Powell has remarked, Sunstein's argument for deliberative politics often "unintentionally sounds very much like an argument for government by an independent judiciary."[34] He remains wedded to many of the elitist strains of traditional constitutionalism even as he assails it for undermining broad public political engagement. This leads to a surprisingly tepid

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a place where it did not exist before. Instead campaign finance laws should be evaluated pragmatically in terms of their consequences for the system of free expression." Pp. 223-24.

32. P. 223.

33. *See, e.g.*, pp. 21-24 (applauding the Framers' measures to insulate both themselves and members of the representative institutions they were designing from scrutiny by, and engagement with, the citizenry); *see also* Sunstein, *supra* note 23, at 43 & n.62 (seeking a contemporary substitute for the Framers' reliance on indirect elections to ensure that " 'some representatives' "—i.e., senators—be elected solely by " 'men most capable of analyzing the qualities adapted to the station' " (quoting THE FEDERALIST No. 68, at 452 (Alexander Hamilton) (Paul L. Ford ed., 1898))).

34. H. Jefferson Powell, *Reviving Republicanism*, 97 YALE L.J. 1703, 1708 (1988).

agenda of democratic reforms and disconcerting vagueness about "democratic arenas" and the actual and possible forms of citizens' participation in government.

Sunstein, then, has the vices of his Madisonian virtues. He is unmatched in appreciating the insights of contrary schools of thought and energetic and often brilliant in his efforts to speak persuasively to opposing parties. Like Madison, he tries to offer something both to the party of order and hierarchy and to the friends of democracy and public liberty.[35] Also like Madison, he shortchanges the latter and thereby weakens his own vision.

I do not mean to gainsay the value of public television or of Sunstein's cautious commitment to campaign finance reform; however, even taken for all they are worth, it is almost impossible to imagine these measures generating the kind of democratic publics Sunstein evokes, actively scrutinizing and recasting the status quo. For this, other measures seem essential, ones that encourage the formation of broad associations of citizens—citizen-workers, citizen-consumers, citizen-parents, and so on—by giving them a share in the regulation and governance of spheres of social and economic life that are currently the domain of narrower elites or more concentrated interests.

The problem of elite or interest group domination of political decisionmaking—the problem of factions—is a central one for Sunstein, both here and in his earlier work.[36] Apart from the reforms already mentioned, Sunstein's chief answer to factions lies in screening them out: using the courts to strike down laws that appear more the result of naked interest group politics than of public-regarding deliberation.[37]

This Madisonian aspiration has genuine appeal. But it seems unduly sanguine about the ability of the courts or other procedural devices to insulate government from the sway of those who possess great advantages in the control of strategic resources. Moreover, suspicion of factions leads Sunstein to overlook that, as Joshua Cohen and Joel Rogers have pointed out, certain kinds of interest group formations may be part of the solution for deliberative democracy, and not only a source of its problems.[38] As Cohen and Rogers conclude, enhancing the powers of countervailing, broad-based associations of citizens is indispensable to promoting deliberative politics in an affirmative state.[39]

In the abstract, Sunstein recognizes that constitutional discourse should embrace legal and institutional reforms that enhance people's capacities for citi-

35. *See* THE FEDERALIST No. 10 (James Madison).

36. *See, e.g.*, pp. 19-20 (stating that legislation based on factional power is a core constitutional violation); pp. 25-38 (arguing that several key clauses of the Constitution all concern the "single underlying evil" of factions); *see also* Sunstein, *supra* note 23 (arguing that both equal protection doctrine and administrative law seek to combat the problems of factions and embody a Madisonian conception of representative democracy); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984) (arguing that the most coherent conception of the limits of state power is a prohibition on the exercise of interest groups' raw political power, or "naked preferences").

37. *See, e.g.*, pp. 30-32 (proposing "a more robust set of [judicially enforced] constraints" on factions).

38. *See* Joshua Cohen & Joel Rogers, *Secondary Associations and Democratic Governance*, 20 POL. & SOC'Y 393, 395 (1992).

39. *See id. passim.*

zenly reflection and collective action.[40] In the concrete, he veers toward court-centered remedies for factions, and ignores a long tradition of nonjudicial debate about government's constitutional duty to empower citizens through affirmative social and economic policies. To that tradition we now turn.

II. Social and Economic Citizenship: An Alternate View of the Constitution's Affirmative Mandates

The Constitution does not "embody any particular economic theory," in Justice Holmes' famous words,[41] but it does enact a social vision, and, as I interpret it, this vision requires positive social and economic rights. Sunstein agrees,[42] but his account of these rights and their justifications is narrow and is cast in a conventional liberalism that slights the felt needs of today as well as the various historical actors, movements, and traditions he invokes.

Sunstein takes a relatively bold stand on the constitutional dimensions of racial and gender justice and against the race- and gender-based impediments to equal citizenship and opportunity.[43] Where economic barriers to full participation are concerned, however, Sunstein's boldness diminishes. He neglects many of the ways economic inequality and powerlessness create political inequality and second-class citizenship.

Discussing the constitutionality of affirmative action, Sunstein rightly argues that those who call it reverse discrimination ignore history in favor of hollow abstractions.[44] But placing class beyond reach of equal citizenship norms also overlooks history. Since colonial times, the problems of race and class in America have been so intricately bound together that they cannot honestly and effectively be addressed separately.[45]

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40. *See, e.g.*, pp. 179-85 (discussing the interdependence of democratic discussion and citizens' preferences).

41. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

42. *See* pp. 138-40 (arguing for rights to food, shelter, medical care, and roughly equal educational opportunity).

43. Pp. 338-45 (arguing for a "legal assault on the castelike features of the status quo with respect to race, sex, and disability" and a "significant restructuring of social practices" to ensure adequate opportunities for, inter alia, education, training, and employment); *see also* pp. 260-61 (arguing that the "sexual and reproductive status quo" should be seen as a "locus of inequality" and that therefore, "restrictions on abortions, surrogacy arrangements, and free availability of pornography" are constitutionally suspect).

44. P. 150.

45. Throughout American history, racial identities and animosities have been used by whites as antidotes to, and substitutes for confronting the reality of, class divisions. *See* William Edward Burghardt DuBois, Black Reconstruction in America (1935); Edmund Sears Morgan, American Slavery, American Freedom: The Ordeal of Colonial Virginia 363-87 (1975); David R. Roediger, The Wages of Whiteness: Race and the Making of the American Working Class (1991). Thus do contemporary conservatives argue that antidiscrimination measures should suffice to enable inner-city African-Americans to escape the "underclass." Thus does the grip of the black "underclass" on the American imagination serve to obscure the historical and economic processes that have created a multitude of "underclasses," most of whom are not black or residents of the inner city. This identification of economic marginality with race has made white poverty seem atypical or accidental. Recently, for example, it has tended to obscure those ways in which "deindustrialization" has affected previously secure white industrial workers much as it has African-American communities. *See* Jacqueline Jones, The Dispossessed: America's Underclasses from the Civil War to the Present 269-92 (1992).

Certainly, judge-made constitutional law has spoken far more forcefully to inequalities of race and sex than to those of class. But that is not so of the non-court-centered, democratic tradition with which Sunstein seemingly allies himself. The historical excursus that follows suggests that from Reconstruction onward, an important dissenting tradition has found in the Civil War Amendments an ideal of equality in which racial and economic justice are entwined.

A. *Threshold Matters*

1. *Why look to the past?*

At this point, many readers may wonder: Why bother with remembering this tradition, or any other? Given the withering critiques of "originalism" that have come down the theoretical pike over the past two decades, why should any account of past understandings of constitutional norms have authority today?

On this question, Sunstein and I may be in some disagreement. We both embrace the critique of originalist interpretation forged by thinkers such as Mark Tushnet and Paul Brest.[46] As Sunstein puts it, neither the Constitution itself nor the texts on which we rely for evidence of past understandings of it can be interpreted "without resort to controversial substantive ideas"; and the substantive ideas or "interpretive principles" that inevitably guide and shape our interpretations can only be defended on "external" grounds, on the basis of good "moral and political reasons" and "arguments."[47] Yet while Sunstein does not think that appeals to the past can purge interpretation of *all* discretion and substantive choices, like the originalists he hopes history can discipline and constrain judges.[48]

I look to the past for different reasons. I reject any sharp distinction between recourse to history and tradition, on one hand, and arguments based on "moral and political reasons," on the other. As Robert Cover and, more recently, Guyora Binder have reminded us, the invocation of tradition is "an almost indispensable component of political argument and political judgment."[49] Political argument inevitably "takes place within the context of some" tradition, while every vital tradition is "constituted by a continuous argument."[50]

A defining feature of the dissenting tradition I describe in this Part has been a view to overcoming the nation's pathology of race by confronting its class divisions along with its racism.

46. *See, e.g.*, Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 786-804 (1983) (arguing that our grasp of the Framers' intent is necessarily indeterminate); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980) (finding a moderate originalism coherent and workable, but arguing that nonoriginalist interpretation better serves the aims of constitutional government).

47. Pp. 102-04.

48. P. 120.

49. Guyora Binder, *Did the Slaves Author the Thirteenth Amendment? An Essay in Redemptive History*, 5 YALE J.L. & HUMAN. 471, 493-94 (1993); *see also* Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* NOMOS *and Narrative*, 97 HARV. L. REV. 4 (1983) (positing that we can only understand law in the context of narratives that give it meaning).

50. ALASDAIR MACINTYRE, AFTER VIRTUE 206 (1981), *quoted in* Binder, *supra* note 49, at 494.

Insofar as constitutional arguments have force in American public life, it is because people believe they belong to a normative community formed by past constitutional commitments. Options that otherwise seem too costly may be acceptable if they appear to sustain the culture that secures this identity. Risky causes and coalitions also may gain legitimacy in this way.[51]

Thus, one boundary of political and moral argument in American public life lies along the available range of conceptions of "our" constitutional past. An alternate account of that past may shift that boundary by altering understandings of who "we" are and what binds us together.

2. *Why now?*

We live in a moment of crisis and flux.[52] Inequalities are widening. The nation's poor are not only poorer and more numerous than twenty years ago; the vanishing of decently paid lower-strata jobs, the general erosion of inner cities' (as well as poorer rural regions') economic bases, the separation of these "poverty zones" from middle-class communities by hardening economic and geographical borders, the perception that those afflicted are overwhelmingly nonwhite, combined with government's hidebound responses to all these developments, threaten a more profound kind of historical regression. They threaten to make the poor, once more, a class apart, cut off from the context of economic opportunity and common political destiny that, in constitutional principle, binds Americans together.[53]

Meanwhile, the nation's broad "middle class" is increasingly anxious about whether "good jobs" will continue to dwindle and public services to decline. They too have seen a steadily widening gap between their material circumstances and those of the most affluent social strata, and they wonder about whether, in the years to come, they will secure decent educations, health care, and other basic social goods for themselves and their offspring—or fall out of the "middle class" into "poverty."[54] Finally, broad segments of the nation's elites agree that many basic institutional arrangements—production and technology systems, corporate structures, labor relations, and attendant public and private forms of social provision—have broken down under the weight of changed economic circumstances and must be rebuilt on new bases. The elites

51. *See, e.g.*, WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 128-66 (1991) (describing the labor movement's fashioning of rights consciousness and rhetoric).

52. For a discussion of the social and economic changes sketched here, some reform initiatives that have greeted them, and the political challenges those initiatives face, see William E. Forbath, *Voluntarism, Producerism, and the Fate of Economic Democracy*, 19 LAW & SOC. INQUIRY 1401 (1994).

53. *See* JONATHAN SIMON, POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890-1990, at 250-56 (1993). Simon suggests that "the formation [in the nation's inner cities] of an underclass without a regular connection to the labor market," in the context of political indifference and hostility, threatens "an unprecedented regression in our political-economic history," thrusting this group into the position of the "dangerous classes" of the early 19th century. *Id.* at 253, 255.

54. *See, e.g.*, BENNETT HARRISON, FALLING WAGES AND GROWING INEQUALITY IN AMERICA (1987); KATHERINE S. NEWMAN, DECLINING FORTUNES: THE WITHERING OF THE AMERICAN DREAM (1993); KATHERINE S. NEWMAN, FALLING FROM GRACE: THE EXPERIENCE OF DOWNWARD MOBILITY IN THE AMERICAN MIDDLE CLASS (1988); KEVIN P. PHILLIPS, BOILING POINT (1992).

are divided, however, about what principles, strategies, and coalitions should govern the rebuilding.[55]

Perhaps in this crisis lies opportunity. It may prove significant that, irrespective of racial and cultural differences, most poor and working Americans appear to agree about this. Equal citizenship, understood as equal standing in the community, hinges on having work or making some other contribution, on earning a decent living, and on access to the basic goods described above.[56] On this understanding, the future of equal citizenship, not only for the nation's poor but for much of working America, may be at stake in decisions underway about rebuilding our social and economic institutions.[57] Events have cast up a common jeopardy and the possibility, however slender, for a renewed common identity and common interests among these disparate groups—an identity and interests resting on the economic and enabling dimensions of equal citizenship.

B. *Sunstein on Social and Economic Rights*

1. *How egalitarian is the Constitution?*

No reputable reading of the Constitution, Sunstein asserts, has ever viewed its promise of political equality as "a guarantee of economic equality."[58] Egalitarianism, "defined as an effort to ensure against large disparities in wealth and resources" is "foreign," in Sunstein's view, to American constitutional culture.[59] Nonetheless, he insists, the constitutional understanding of political equality has not been indifferent to the social and economic conditions of the citizenry; three "narrower conceptions of equality" have shaped our constitutional understanding.[60]

The first is freedom from desperate conditions, which Sunstein defines as the rights to police protection, food, shelter, and medical care. Although this freedom only found canonical expression in Franklin Roosevelt's "second Bill

55. *See, e.g.*, OTIS L. GRAHAM, LOSING TIME: THE INDUSTRIAL POLICY DEBATE (1992); VISION FOR THE 1990S: U.S. STRATEGY AND THE GLOBAL ECONOMY (Daniel F. Burton & Felix G. Rohatyn eds., 1989); Kenneth Root, *Job Loss: Whose Fault? What Remedies?, in* DEINDUSTRIALIZATION AND THE RESTRUCTURING OF AMERICAN INDUSTRY 65 (Michael Wallace & Joyce Rothschild eds., 1988).

56. Polling data suggest "the existence of a deep and enduring current of spontaneous public support for the proposition that the federal government should guarantee everyone the right to a job paying living wages." PHILIP HARVEY, SECURING THE RIGHT TO EMPLOYMENT: SOCIAL WELFARE POLICY AND THE UNEMPLOYED IN THE UNITED STATES 4 (1989). This conviction survived the Reagan era undiminished:

> In a New York Times/CBS poll conducted in late November 1987, the proposition that "the government in Washington should see to it that everyone who wants a job has a job" was supported by a margin of 71 percent to 26 percent. The only proposal receiving more support was that the government should "guarantee medical care for all people."

Id. at 4-5 (citing E.J. Dionne, *Poll Finds Reagan Support Down But Democrats Still Lacking Fire*, N.Y. TIMES, Dec. 1, 1987, at A1).

57. See Forbath, *supra* note 52, at 1407-15, for a brief discussion of contending social and industrial policy proposals from the perspective of equal citizenship norms. My work-in-progress, provisionally titled *Social Citizenship*, addresses the interplay of equal citizenship norms and social and industrial policy in some detail (manuscript on file with author).

58. Pp. 137-38.

59. P. 138.

60. P. 138.

of Rights," Sunstein contends that Jefferson and Madison "enthusiastically endorsed" it.[61] The second equality principle is opposition to caste systems, which was "the defining feature of the Civil War Amendments."[62] Today, Sunstein argues, the main effect of embracing this principle would be to loosen the Court's tight reins on local and state government affirmative action programs.[63] The final principle is rough equality of opportunity, which was a central theme of both the framing and Civil War periods and, in Sunstein's view, should mean equalizing and enhancing public education.[64]

The first thing one might note about this inventory of constitutional equality principles is that despite its historical moorings and its break with the judicial model, its agenda seems set by relatively recent, court-centered constitutional politics. Sunstein's innovations involve reconsidering a number of key cases and doctrinal developments of the past two decades. Thus, the "equality of opportunity" principle, in Sunstein's account, revisits *San Antonio Independent School District v. Rodriguez*.[65] The "opposition to castes" principle revisits *City of Richmond v. J.A. Croson Co.*,[66] and the "freedom from desperate conditions" principle invites Congress to finish what many commentators hoped the Warren Court had begun in its salad days: recognizing a constitutional right to minimal welfare entitlements.[67]

In adopting this welfare-entitlements view of constitutional equality, Sunstein ignores how profoundly the view was shaped by an understanding that the federal judiciary would be its guarantor. Yet it seems clear that the leading advocates of a constitutional right to welfare entitlements have tailored this right to comport with an institutional vision of the federal judiciary as a countermajoritarian guardian of the rights of "discrete and insular minorities."[68]

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61. P. 138.

62. P. 139.

63. Pp. 338-46.

64. Pp. 139-40.

65. 411 U.S. 1 (1973). In *Rodriguez,* the Court rejected an equal protection challenge to a property-tax-based public school financing scheme that created sharp disparities among districts. Sunstein would have struck down the scheme because of the "close connection between education and constitutionally specified rights." P. 140.

66. 488 U.S. 469 (1989). In *Croson,* the Court voided a state system of set-aside contracts for minority-owned business on the grounds that the remedy was overbroad and the state offered no evidence of prior remediable discrimination. *Id.* at 498-508. Sunstein would refer these judgments to democratic debate. P. 157.

67. *See* pp. 138-40. For earlier commentary on this score, see, e.g., Grey, *supra* note 1; Michelman, *On Protecting the Poor, supra* note 1; Michelman, *Welfare Rights, supra* note 1.

68. United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938). Thus, for example, Frank Michelman finds a warrant for constitutionalizing welfare entitlements in the fact that welfare recipients typically are seen by the majority culture as belonging to racial minorities and, as a consequence, suffer manifold "stigmatizing discriminations in treatment that reflect [and] reinforce . . . systematic bias" against them in the "group-oriented, majoritarian political process." Michelman, *Welfare Rights, supra* note 1, at 675; *see also id.* at 660 & n. 9 (defining a "constitutional right" as "a legal right to some state of affairs," enforceable in "legal disputes"). *But see* Grey, *supra* note 1, at 900 (stating that "it may be that institutional considerations governing the relations between the judiciary and the legislative branch will forever preclude" judicial enforcement of welfare entitlements).

In the name of democracy, Sunstein argues for stripping this still-unrecognized minority right of any claim to judicial recognition. He is wrong-headed, I think, in doing so and ignores the thoughtful counterarguments that scholars like Frank Michelman and Kenneth Karst have made to objections like Sunstein's when they were first voiced by conservative critics like Judges Ralph Winter and Robert Bork two decades ago.[69]

Nonetheless, having removed the countermajoritarian difficulty, Sunstein ought to have reconsidered the contours of the right itself. Unconstrained by a lack of democratic pedigree or the problems of judicial competence, Sunstein still does not consider viewing this right as but one part of a broader understanding of the enabling and distributive dimensions of constitutional equality. He summarily rejects the case for such a broad understanding, although, as we shall see, that understanding is not only a better bet in the context of Sunstein's majoritarian "democratic arenas" but is also stronger, as a matter of constitutional history and interpretation, than the case he makes for his own more crabbed view of the Constitution's affirmative mandates.

2. *Sunstein and the Framers on poverty.*

Pace Sunstein, it is hard to imagine Jefferson or Madison "enthusiastically endors[ing]" his freedom from desperate conditions principle as he construes it. True, both men had a great deal to say about poverty and the threat it posed to republican government. Both believed poverty bred despair, which periodically led people to follow demagogues and tyrants. Moreover, in the Framers' view, poverty—or, more precisely, propertylessness—made men materially dependent on others, on masters, for their livelihood, and therefore unfit for citizenship.[70] The poverty of the "servant" as well as the "pauper" made them vulnerable to coercion, threatening the integrity of their opinions and of their (hypothetical) ballots.

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69. For the conservative critique, see Ralph K. Winter, *Poverty, Economic Equality, and the Equal Protection Clause,* 1972 SUP. CT. REV. 41 (arguing that there is no justiciable standard for determining when constitutional welfare rights are satisfied); Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution,* 1979 WASH. U. L.Q. 695 (arguing that courts cannot decide the policy issues inherent in implementing social and economic rights). For responses to this critique, see Karst, *Citizenship, Race, and Marginality, supra* note 1, at 35-38, 42-45 (analyzing the "types of degrading poverty and . . . official neglect" that judges can identify and suggesting ways to find workable remedies); Michelman, *Welfare Rights, supra* note 1, at 660-65, 679-80 (conceding the existence of "judicially inappropriate questions of definition" and enforcement, but suggesting ways to monitor legislatively created social service programs through statutory interpretation and "constitutional doctrines such as irrational classification").

70. Slavery represented the extremity of dependence on a master; likewise, women, simply by dint of their sex, were made legally dependent on "masters"—fathers, husbands—and were deemed by the Framers, therefore, unfit for citizenship. *See* LINDA K. KERBER, WOMEN OF THE REPUBLIC 119-20, 139, 159 (1980).

On Madison's view that the dependency of the landless poor made them unfit citizens, see MCCOY, *supra* note 21, at 129; DREW R. MCCOY, THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY 202-05 (1989). For discussion of Jefferson's and Madison's shared views on this matter and their common concern to prevent the emergence of a large class of "laboring and idle poor" in the new republic and on the danger of upheaval they would represent, see MCCOY, *supra* note 21, at 126-29.

For these reasons, Jefferson and Madison agreed that the new republic could ill afford a large and permanent class of poor and propertyless (yet unenslaved, white) men. Their main solution, however, was not enhancing poor relief, the eighteenth-century analog to welfare. Poor relief left "paupers" dependent and unqualified for citizenship. Instead, as you might expect, they favored ensuring ample material opportunities for all white men willing and able to exploit them, and charity or coercion for the rest.[71]

To Madison or Jefferson, the socioeconomic key to individual freedom and citizenly independence was ownership of productive property, and at various times both men said citizens had a *right* to sufficient property to support themselves and their families and championed broad distributive policies on that basis. Thus, in his Draft Constitution for Virginia, Jefferson included under "Rights Private and Public" a provision that "Every person of full age . . . shall be entitled to an appropriation of 50 acres of land . . . in full and absolute dominion."[72] Jefferson also wrote that the "fundamental right to labor," as it belongs to the unemployed poor, may trump the property rights of large landholders.[73] Sunstein's own quotations of the two men seem to run in this direction, rather than in the one that Sunstein points them. For example, he quotes Madison contending for laws that " 'reduce extreme wealth to a state of mediocrity, and raise extreme indigence to towards a state of comfort.' "[74] In short, I think Madison and Jefferson would have sympathized more with "efforts to ensure against large disparities in wealth and resources," which Sunstein insists they abjured, than with the welfare entitlements he would have them endorse.[75]

3. *Sunstein's abridgment of FDR's "second Bill of Rights."*

Sunstein also projects his own outlook upon FDR, but in fact, the positive social and economic rights in FDR's "second Bill of Rights" are a good deal

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71. McCoy describes Madison's and Jefferson's insistence that the principle solution to poverty and dependency lay in a broad distribution of property in MCCOY, *supra* note 21, at 126-27. Madison and Jefferson also emphasized education and, for those lacking initiative, the workhouse. *See* MCCOY, *supra* note 70, at 199 (discussing Madison's views on educating the poor); THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 133 (William Peden ed., 1955) (1787) (favoring public charity for the poor lacking "strength to labor" and the workhouse for "[v]agabonds, without visible property or vocation").

72. THOMAS JEFFERSON, DRAFT CONSTITUTION FOR VIRGINIA, JUNE, 1776, § 4, *reprinted in* THE PORTABLE THOMAS JEFFERSON 244, 248 (Merrill Peterson ed., 1975).

73. 8 THOMAS JEFFERSON, THE PAPERS OF THOMAS JEFFERSON 682 (Helen Claire Bullock ed., 1953), *quoted in part* pp. 138-39.

74. P. 139 (quoting 14 JAMES MADISON, THE PAPERS OF JAMES MADISON 197-98 (Robert A. Rutland ed., 1983)).

75. Of course, there are other, more profound problems with efforts to "revive" the republicanism of a Jefferson or Madison as a guide for contemporary questions of distributive justice. If their constitutional thinking about property had an important distributive dimension, Jefferson's and Madison's framework also had a profoundly exclusionary aspect. Slaves, women, servants, hirelings, indeed the majority of adults in the new nation, lacked the legal qualifications for full citizenship, suffrage, and political participation, and republican ideology supplied the most compelling justification for their exclusion. They were propertyless dependents, subject, in varying degrees, to a master's will and therefore unfit for full citizenship. *See* KERBER, *supra* note 70, at 119-20, 139, 159; MORGAN, *supra* note 45; Robert J. Steinfeld, *Property and Suffrage in the Early American Republic,* 41 STAN. L. REV. 335 (1989).

broader than Sunstein suggests, and embody a vision of citizenship quite different from his brand of welfare liberalism.

Although Sunstein mentions only the rights encompassed by his own "freedom from desperate conditions," FDR's Bill went further. In addition to "adequate food and clothing and recreation," medical care, and "a decent home," Roosevelt's Bill included: "The right to a useful and remunerative *job*. . . ; [t]he right to *earn* enough . . . ; [t]he right of farmers to raise and sell their products . . . ; [t]he right of every businessman . . . to trade [free from] *domination* by *monopolies* at home or abroad . . . ."[76] Roosevelt, like Sunstein, emphasized material security as a precondition for democratic citizenship. But Roosevelt equally emphasized the value of economic independence and the view that "true freedom" was bound up with a measure of participation and control in the realm of work and economic institutions.[77]

To put it, somewhat anachronistically, in current policy rhetoric, Roosevelt was alive to the dangers, constitutional dangers, of "welfare dependency"; he agreed with current conservatives who argue that welfare can promote passivity without improving citizens' life chances and he agreed that equal citizenship entails responsibilities as well as rights.[78] Unlike that of today's conservatives, however, Roosevelt's rhetoric suggested that rights must precede responsibilities. Unless public policy vouchsafes the availability of work for all, he might have observed, it is a cruel hoax to rely on the "discipline of the market" to inculcate citizenly virtues like self-reliance and responsibility.

Unlike Sunstein's, then, Roosevelt's understanding of New Deal constitutionalism embraced a right to decent, useful work. More broadly, as other provisions of FDR's Bill suggest, he and many other New Dealers thought the nation's financial and industrial orders were fraught with constitutional infirmities. In this, as we will see, they belonged to a long and varied tradition.[79] Thus, when Sunstein spurns any concern about "large disparities of wealth and resources" as "foreign" to American constitutional culture, he overlooks a rich history of constitutional concern about the distribution of power over economic resources and about economic dependence, dispossession, and powerlessness. Although equality understood as an absolute, countinghouse leveling of individual wealth has never enjoyed any constitutional cachet, equality conceived

76. Franklin D. Roosevelt, Message to Congress on the State of the Union (January 11, 1944), *reprinted in* 13 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 32, 41 (Samuel I. Rosenman ed., 1969) [hereinafter PUBLIC PAPERS] (emphasis added).

77. *Id.* at 40-41 (discussing rights to economic security and independence); *see also* Franklin D. Roosevelt, Presidential Statement upon Signing National Labor Relations Act (July 5, 1935), *reprinted in* 4 *id.* at 294, 294-95 (upholding the right of labor to independent self-organization and to collective bargaining and deliberation with management); Franklin D. Roosevelt, Recommendations to the Congress Designed to Stimulate Further Recovery (Apr. 14, 1938), *reprinted in* 7 *id.* at 221, 225 (same).

78. "The Federal Government," Roosevelt frequently declared, "must and shall quit this business of relief." *E.g.*, Franklin D. Roosevelt, Annual Message to the Congress on the State of the Union (January 4, 1935), *reprinted in* 4 *id.* at 15, 20. Conservatives fond of quoting this line may not realize that Roosevelt said it in a speech in which he proposed the Works Progress Administration, the largest government jobs program in the nation's history. *Id.* at 20-22; *see also* WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL 1932-1940, at 124 (1963).

79. *See* text accompanying notes 90-152 *infra*.

as shared and broadly distributed power over the nation's material resources has had a distinguished career in the tradition Sunstein claims to describe.

Below, I briefly recount that legacy, restoring some of the bolder branches that Sunstein has cut off. My focus will remain on social and economic rights and on the vision of citizenship behind them.

C. *Social and Economic Citizenship: A More Ambitious View*

Sunstein describes the distributive dimension of equal citizenship as freedom from desperate conditions.[80] As I understand it, however, this dimension of equal citizenship is deeper and more complex. It embraces freedom from desperate conditions but also a right to decent, useful work, or what one could call substantive equal opportunity, as well as a right to some measure of participation in workplace decisionmaking and in the regulation of one's economic sphere.

1. *Decent work and a social minimum.*

The right to decent work traditionally has not been understood in terms of individual entitlements. And although elements of it, like some kinds of job training and employment opportunities, ought to take that form, one should not see the right solely in entitlement terms. Rather, the right connotes a broad duty of government to strive to shape our economic institutions to ensure decent work and an acceptable income for all. This understanding reflects an awareness of the practical limitations of entitlement programs for accomplishing ambitious distributive goals. It also reflects a normative conviction that decisions about the structure and regulation of labor markets, the financial order, and other economic realms understood today as lacking a constitutional dimension should be guided, in part, by the Constitution's promise of equal citizenship.

I consider the historical links between a right to decent work and the constitutional ideal of equal citizenship below. I note here two main theoretical reasons equal citizenship should include this right.

First, a decent livelihood is necessary to ensure the material security people need to participate in civic life. This point echoes Sunstein's rationale for his freedom from desperate conditions principle insofar as he believes, with thinkers like Michelman, that this freedom encompasses "shelter not only from the elements but from the physical and psychological onslaught of social debilitation,"[81] or what political theorists have called a "social minimum,"[82] a living standard that enables people to live minimally "decent and tolerable lives."[83] But if this is what Sunstein envisions, then he glosses over the severe practical

80. *See* text accompanying note 67 *supra.*

81. Michelman, *Welfare Rights, supra* note 1, at 677.

82. *E.g.*, JEREMY WALDRON, LIBERAL RIGHTS 250-70 (1993) (discussing the underpinnings of the social minimum idea in contemporary social theory and moral philosophy).

83. *Id.* at 250.

and political difficulties of relying chiefly on welfare entitlements to ensure such a living standard for all.

Moreover, the social minimum gains deeper practical and normative significance in conjunction with the right to decent work. An entitlement to a social minimum would protect people against the material desperation that might make them submit to work under indecent—exploitative, abusive, or demeaning—conditions. Guaranteeing public sector jobs for the persistently unemployed would also accomplish this, however; and such a guarantee would mean that, in contrast to Sunstein's scheme, the principle of the social minimum would not have to bear all the weight of insuring against the constitutional injury of desperate conditions and its consequences in second-class citizenship.[84]

Decent work is necessary for a second reason, more moral than material. Countless sociologists and historians have told us that in the United States, perhaps more than in most other nations, work is essential to a person's standing as an equal member of the community and polity.[85] Psychologists and ethnographers too confirm FDR's insight that chronic lack of work erodes the self-respect and respect from others that enable one to feel, and be treated as, an equal in American life.[86] Equality of worth, not in dollars, but in the sense of having the opportunity to earn a decent living, to make some socially recognized contribution, is a constitutional matter.

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84. The most thorough recent proposal for such a public sector jobs program, assessing the economic and administrative problems it would present, its likely effects on various labor markets, and the question of useful work for the program's work force, is HARVEY, *supra* note 56. A shorter treatment responding thoughtfully to certain key moral and practical critiques of the idea of state-guaranteed employment for the able-bodied poor is Richard J. Arneson, *Is Work Special? Justice and the Distribution of Employment*, 84 AM. POL. SCI. REV. 1127 (1990); *see also* MARGARET WEIR, POLITICS AND JOBS: THE BOUNDARIES OF EMPLOYMENT POLICY IN THE UNITED STATES (1992).

Tied to such a program, the social minimum would reflect a commitment to providing a decent livelihood to single parents and other caretakers, to the old, the infirm, to those pursuing various educational and training opportunities, and to others unable to work for short or long periods. For thoughtful discussions and debate about how far a democratic society today ought to rely on the social minimum versus jobs to ensure equal membership and decent living standards, see ARGUING FOR BASIC INCOME: ETHICAL FOUNDATIONS FOR RADICAL REFORM (Philip Van Parijs ed., 1992). I discuss this knotty question and the debates surrounding it at some length in a work-in-progress provisionally titled *Social Citizenship* (manuscript on file with author).

85. *See, e.g.*, DAVID BENSMAN & ROBERTA LYNCH, RUSTED DREAMS (1987); ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR (1970); LEONARD GOODWIN, DO THE POOR WANT TO WORK? (1972); NEWMAN, *supra* note 54; DANIEL T. RODGERS, THE WORK ETHIC IN INDUSTRIAL AMERICA, 1850-1920 (1978); ELLEN I. ROSEN, BITTER CHOICES: BLUE-COLLAR WOMEN IN AND OUT OF WORK (1987). For the concept of citizenship as "standing," I am indebted to JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 63-101 (1991) (discussing earning a living as a right and obligation of citizenship).

86. A recent landmark study, PETER KELVIN & JOANNA E. JARRET, UNEMPLOYMENT: ITS SOCIAL PSYCHOLOGICAL EFFECTS (1985), canvasses the empirical work on the pyschological effects of unemployment in Europe and America. The authors underscore the stigmatizing quality of unemployment and the withdrawal of the unemployed from most arenas of social life, both because of shame and because of the "sheer, progressively exhausting effort needed to keep going . . . and the unemployed indvidual's frequent debilitating dislike of himself." *Id.* at 54. A powerful sociological account by a constitutional scholar depicting chronic unemployment in the black ghetto as a denial of equal citizenship is Karst, *Citizenship, Race, and Marginality*, *supra* note 1, at 8-18.

Conventional equal opportunity rhetoric evokes these ideas, but its proponents have succeeded only in barring discrimination in employment and education. Sunstein would go further, especially in his constitutional call for improving and equalizing public education.[87] But his account of equal opportunity, too, remains insufficient. Work, broadly understood, is a precondition of equality.

2. *Freedom from "wage slavery": A measure of economic democracy.*

Equal citizenship requires something else, as well. In addition to opportunity, citizens must also enjoy a measure of democracy at work and in their economic lives. The principle reasons are twofold. First is character formation. Participating in the governance of one's workplace contributes to what John Stuart Mill called an "active character"—a sense that social arrangements are malleable and subject to improvement by one's efforts.[88] Likewise, it enables individuals to develop and exercise their capacities for shouldering responsibilities and for making judgments about the common good.

One who has no autonomy and no measure of shared authority at work, like the subject of any tyrannical regime, learns to doubt her capacity to affect the order of things. At worst, she learns passivity and inner exile, at best, the arts of accommodation and resistance that disenfranchised workers always have used to gain some informal sway over their conditions. In either case, talk about mutual responsibility and the common good, the language of citizenship, rings hollow to her. This character-based argument for economic democracy is of a piece with widely held eighteenth and nineteenth century views that extreme economic dependence stymies the development of citizenly virtues.

The second reason equal citizenship entails economic democracy might be called the Realist argument. It tracks the Realist attack on the public/private distinction, as applied to the "private" firm. Rather than as a creature of private, consensual arrangements in a self-regulating market, the firm is better understood as exercising a substantial degree of sovereign authority over its employees by virtue of a legally constructed delegation of public power. From here, the argument develops the idea that certain features of political society are widely held to require a democratic constitution in order to justify the exercise of sovereign authority over society's members, and that the firm, in fact, shares those very features.[89]

Because members of a political society contribute to the ongoing life of society, so the argument runs, and because they are subject to the rules and policies that regulate their common life and are capable of assessing those rules and policies, we believe they have a right to participate in their determination. But workers contribute to the ongoing life of the firm, are subject to the rules

87. *See* note 64 *supra* and accompanying text.

88. JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 193, 211-18 (J.M. Dent 1972) (1861), *quoted in* Joshua Cohen, *The Economic Basis of Deliberative Democracy*, SOC. PHIL. & POL'Y, Spring 1989, at 25, 29.

89. For trenchant contemporary versions of this argument, see ROBERT ALAN DAHL, A PREFACE TO ECONOMIC DEMOCRACY (1985); Cohen, *supra* note 88.

and policies that govern it, and are capable of assessing those rules and policies. Therefore, unless it can be shown that compared to the status quo, economic democracy would ill serve society's material needs (or injure some other moral needs), the values and principles that support political democracy also require economic democracy. As we shall see, versions of this argument have confirmed generations of reformers in believing that tyrannical or authoritarian governance at work is incompatible with political democracy and republican government.

D. *Equal Citizenship, Positive Rights, and the Distributive and Enabling Dimensions of the Civil War and Reconstruction Amendments*

The language of equality did not appear in the Constitution prior to the adoption of the Civil War and Reconstruction Amendments.[90] Since then, however, subordinated groups repeatedly have laid claim to the status of citizens and rights bearers in language rooted in those amendments. As Hendrik Hartog has observed,

> The long contest over slavery did more than any other cause to stimulate the development of an alternate, rights conscious, interpretation of the federal constitution .... [T]he varying meanings that have been derived from the phrase "equal protection of the laws" are rooted in contending visions of what it was that was overthrown by the end of slavery.[91]

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90. *See* Stanley Katz, *The Strange Birth and Unlikely History of Constitutional Equality*, 75 J. AM. HIST. 747 (1988).

91. Hendrik Hartog, *The Constitution of Aspiration and the "Rights that Belong to us All,"* 74 J. AM. HIST. 1013, 1017 (1988). Hartog's splendid essay errs, in my view, in its insistence that the "Great Tradition" of emancipatory aspirations expressed through consitutional "rights consciousness" has been a resolutely liberal tradition—a reworking of the negative freedoms and possessive individualism associated with classical liberal ideals. *Id.* Hartog's conclusion may reflect the signal importance of liberal notions of rights and liberty in the 19th century women's rights movement, which looms largest in Hartog's work. I understand this tradition as a whole; however, to involve a plurality of conceptions of rights, including the strain Hartog underscores, but also including affirmative republican and communitarian conceptions, which figured prominently in African-American, agrarian, and labor movement history. In two familiar examples of this positive rights consciousness, freed slaves asserted a right to land and schools, and their claims were aimed as much toward constituting communities as securing individual autonomy, *see, e.g.*, ERIC FONER, NOTHING BUT FREEDOM: EMANCIPATION AND ITS LEGACY (1983); LEON LITWACK, BEEN IN THE STORM SO LONG (1979); Guyora Binder, Negating Slavery (1992) (unpublished manuscript on file with author), and Populist farmers claimed a right to a system of public credit, and their arguments were framed as much in terms of material preconditions for political democracy as the pursuit of private happiness. *See* William E. Forbath, *The Curse of Bigness* Revisited: The Anti-Monopoly Alternative to Corporate Capitalism (work-in-progress on file with author) [hereinafter Forbath, Anti-Monopoly Alternative]; William E. Forbath, The Labor-Populist Constitution and the Idea of Social Citizenship (work-in-progress on file with author) [hereinafter Forbath, Labor-Populist Constitution].

Hartog's account also overlooks that several of these alternate constitutional outlooks cannot be characterized simply as vocabularies of individual rights. The Populists, who produced a constitutional literature second only to the abolitionist movement in its magnitude and complexity, were as concerned with questions of federal authority and its assertedly unconstitutional delegation to private corporations as they were with rights, and their "rights consciousness" cannot be understood apart from these systemic constitutional concerns. When a Populist or Gilded Age labor leader spoke of the "people's" constitutional rights, he or she most often was invoking the constitutional obligations of Congress and state legislatures to shape and oversee the nation's economic development in ways that fostered democracy and equal citizenship, as well as material progress. *See* text accompanying notes 107-130 *infra*.

From the late nineteenth century through the New Deal era, periodic economic crises brought forth renewed efforts to realize the distributive and enabling economic dimensions of the equal citizenship ideal. Like contemporary advocates for racial and gender equality, crusaders against wage slavery and for a right to decent work fought many of their battles on the ideological terrain of the Civil War Amendments.

1. *The distributive ideal meets industrial capitalism.*

The postbellum Republicans. By dint of those amendments, "We the People" had become in 1867 "[a]ll persons born or naturalized in the United States"[92] irrespective of "race, color, or previous condition of servitude."[93] The nation promptly broke this promise of equality, but not before the Radical Republicans who led the battles for the Thirteenth, Fourteenth, and Fifteenth Amendments outlined an understanding of equal citizenship that spoke to the social and economic circumstances of former slaves and white workers alike.[94]

92. U.S. CONST. amend. XIV, § 1, cl. 1.

93. U.S. CONST. amend. XV, § 1.

94. Of equal importance are the views of the two principal groups who suffered most from the broken promise, women and African-Americans. The organizations that led these two groups' struggles for equal citizenship agreed with the Radicals in Congress that the right to vote and the right to pursue a calling were core rights, from which others radiated.

The Radicals in Congress had turned to the women's rights movement for help in passing the 13th Amendment, and the latter organized the nation's first grass-roots campaign supporting a constitutional amendment. *See* Ellen Carol DuBois, *Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the U.S. Constitution, 1820-1878,* 74 J. AM. HIST. 836, 844 (1987). Yet most of Congress' Radicals proved content to let women remain indefinitely in what Elizabeth Cady Stanton derided as "a transition period from slavery to freedom." *See* Elizabeth B. Clark, *Matrimonial Bonds: Slavery and Divorce in Nineteenth-Century America,* 8 L. & HIST. REV. 25, 34 (1990) (quoting Stanton). On the question of including women within the scope of the 15th Amendment, the Radicals abandoned their erstwhile allies and drew the line at black male suffrage. DuBois, *supra,* at 844-48.

Women's rights activists also insisted that women, both black and white, were entitled to equal civil rights in the sphere of market and property relations. While they strove to valorize women's unpaid domestic labor, they also demanded women's right to own property and to pursue a calling and earn money outside the home. These rights were necessary to gain what Stanton and others called "self-sovereignty" in marriage relations, as well as equal standing in civil society. *See* DuBois, *supra,* at 856 (discussing the origins of the idea of "self-sovereignty"); *see also* NORMA BASCH, IN THE EYES OF THE LAW 162-99 (1982) (discussing the links between women's battles for suffrage, contract and property rights, and greater equality in domestic and civic life).

Spokespeople for the ex-slaves agreed that political freedom required economic independence, and most ordinary freedmen and women seem to have agreed with Thaddeus Stevens on the necessity of confiscating the largest plantations and redistributing them to ex-slaves in order to secure the African-Americans' liberty. *See* note 95 *infra.* Only land, said former Mississippi slave Merrimon Howard, would enable "the poor class to enjoy the sweet boon of freedom." Letter from Merrimon Howard to Adelbert James (Nov. 28, 1873), *in* AMES FAMILY PAPERS, *quoted in* Eric Foner, The Meaning of Freedom in the Age of Emancipation, Presidential Address to the Annual Conference of Organization of American Historians 38 (Apr. 15, 1994) (on file with the *Stanford Law Review*); *see also* FONER, *supra* note 91, at 68, 235-37; LITWACK, *supra* note 91, at 401-04. Most national African-American leaders, however, took a moderate stance on the key issue of land redistribution. They urged their constituents to labor hard, save their earnings, and become freeholders on their own. *See* FONER, *supra* note 91, at 54-57; LITWACK, *supra* note 91, at 399-408. But these leaders still felt that one who labors for another risks unfreedom, and throughout the South during Reconstruction, black Republican leaders formed coalitions with representatives of white yeomen and tenant farmers to build up a Southern base for the "party of free labor." With the goal of broadening the distribution of property and creating a large class of viable freeholders, several of these so-called "Black Republican" state parties succeeded, for a brief season, in passing redistributive taxes, lien laws, and land-lease measures, and in creating the South's

To the Radicals, suffrage was necessary but not sufficient to underpin the freedmen's new status as citizens. Citizenship also required a material foundation; and that implied a constitutional right to pursue a calling. In the Radicals' view, this entailed not only equal rights to contract and own property, but also subsidized public education and training, as well as land redistribution—"forty acres and a mule," in the famous phrase.[95]

The idea was not limited to former slaves. Thaddeus Stevens and other Republicans pressed for generous homestead laws and land grant colleges for white hirelings in the North.[96] They thought, in Akhil Amar's apt phrase, that "property is such a good thing . . . so constitutive, so essential for both individual and collective self-governance," that "every citizen should have some."[97]

As the House gave the Fourteenth Amendment its final approval, Stevens voiced the Radicals' broad aspirations for Reconstruction. Having "broken up for awhile the foundation of our institutions," the Civil War, the abolition of slavery, and the constitutional changes afoot together meant the nation might "free all our institutions from every vestige of human oppression, of inequality of rights, of the recognized degradation of the poor, and the superior caste of the rich."[98]

Small wonder, then, that as the Labor Question eclipsed the Slavery Question in the politics of the rapidly industrializing postbellum North, it too had a constitutional cast. Elite reformers who styled themselves "New Liberals" assailed union-sponsored labor laws as trampling workers' constitutional liberties.[99] For their part, labor leaders said the Constitution *demanded* these measures to combat wage slavery and corporate tyranny.[100]

That labor invoked constitutional provisions aimed at protecting the rights of black ex-slaves in the South to support rights for white workers in the North may seem to have been farfetched. It was not. This link lay at the heart of the Republican Party's antislavery ideology during the Civil War and Reconstruction. Lincoln always referred to the Republicans as the party of "free labor."[101]

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first public education systems. *See* ERIC FONER, RECONSTRUCTION 281-411 (1989) [hereinafter FONER, RECONSTRUCTION].

95. In a speech to Pennsylvania's Republican convention in September 1865, Thaddeus Stevens called for the seizure of the 400 million acres belonging to the wealthiest 10% of Southerners. Forty acres would be granted to each adult freedman and the remainder—some 90% of the total—sold to the highest bidder, in plots, he later added, no larger than 500 acres. Even among Radicals, however, there was no unanimity on the land question; many proved reluctant to support a program that seemed to run so far afoul of the sanctity of private property. *See* FONER, RECONSTRUCTION, *supra* note 94, at 235-36.

For a provocative argument grounding a constitutional right to minimal entitlements in Stevens' notion, see Amar, *Forty Acres and a Mule, supra* note 1.

96. *See* WILLIAM SCOTT, IN PURSUIT OF HAPPINESS: AMERICAN CONCEPTIONS OF PROPERTY FROM THE SEVENTEENTH TO THE TWENTIETH CENTURY 61-70 (1977).

97. Amar, *Forty Acres and a Mule, supra* note 1, at 37.

98. CONG. GLOBE, 39th Cong., 1st Sess. 3148 (1867) (remarks of Rep. Stevens), *quoted in* FONER, RECONSTRUCTION, *supra* note 94, at 254.

99. *See* DAVID MONTGOMERY, BEYOND EQUALITY: LABOR AND THE RADICAL REPUBLICANS 379-86 (1967); JOHN G. SPROAT, "THE BEST MEN": LIBERAL REFORMERS IN THE GILDED AGE 218-33 (1968); William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WISC. L. REV. 767, 786-801.

100. MONTGOMERY, *supra* note 99, at 230-42; Forbath, *supra* note 99, at 800-17.

101. *See* FONER, *supra* note 85; Forbath, *supra* note 99, at 773-79.

And the Republican leadership repeatedly declared that the Reconstruction Amendments embodied a promise of universal freedom, limited to "neither black nor white."[102] In particular, as Lea VanderVelde has shown in brilliant detail, they cast the Thirteenth Amendment as a charter of free labor, aimed at ending the degradation of labor, "both black and white."[103] They sought much more from the Amendment than the permanent end of chattel slavery; it guaranteed an "affirmative state" of labor freedom[104] and promised to subdue that spirit in both North and South which "makes the laborer the mere tool of the capitalist."[105] The Radicals, whose vision of labor freedom animated Reconstruction debates, had little doubt that justice for the freedmen and women and justice for all working people were bound up with one another.[106] But what exactly were the rights of "free labor"—what obligations rested on government to ensure the distributive ideal and vision of citizenly dignity and independence most Republicans shared—remained unsettled and only grew more contested with time.

Gilded Age reformers. After Reconstruction, racial backlash in the South and class strife and agrarian unrest in the North and Midwest drove Republican leaders to remake the party into a bastion of business and laissez-faire.[107] Their equal rights rhetoric gradually hardened into an antidemocratic and antiredistributive liberal orthodoxy, which became the liberal-legal orthodoxy expressed in cases like *Lochner*.

Yet even some of the architects of this orthodoxy—jurists like Thomas Cooley and elite lawyers and legal reformers like David Dudley Field—anguished long and hard over the fate of the distributive ideal in an industrialized America.[108] Like their counterparts in the agrarian and labor protest movements, these "new liberal" constitutional thinkers embraced the idea of cooperative ownership of the tools of industry as the modern equivalent of broadly distributed yeoman property. To a surprising degree, they shared the labor and agrarian radicals' conviction that the emerging corporate order offended the republican Constitution.

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102. CONG. GLOBE, 39th Cong., 1st Sess. 343 (1866) (remarks of Sen. Wilson), *quoted in* Lea VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 446 (1989); *see* NORMAN BELZ, EMANCIPATION AND EQUAL RIGHTS 108-40 (1978); CHARLES FAIRMAN, RECONSTRUCTION AND REUNION 1117-49 (1971).

103. VanderVelde, *supra* note 102, at 453.

104. *Id.* at 438.

105. CONG. GLOBE, 38th Cong., 1st Sess. 2948 (1864) (remarks of Rep. Shannon), *quoted in* VanderVelde, *supra* note 102, at 471.

106. *See* note 119 *infra* and accompanying text.

107. *See* ERIC FONER, POLITICS AND IDEOLOGY IN THE AGE OF THE CIVIL WAR 97-200 (1980); Forbath, *supra* note 99, at 786-801.

108. *See, e.g.*, Thomas M. Cooley, *Labor and Capital Before the Law*, 139 N. AM. REV. 503, 512-15 (1884) (urging that morally, "the [employer's] business is as much that of those who bring to it their labor . . . [and not] exclusively their employers'," and so the latter should share "control" and "profits" with employees); David Dudley Field, *Industrial Coöperation*, 140 N. AM. REV. 411, 417 (1885) (urging that capitalists fufill the "aims of American republicanism" by transforming corporations into labor-capital cooperatives); David Dudley Field & Henry George, *A Conversation*, 141 N. AM. REV. 1, 10-11 (1885) (Field arguing the same).

However, these "new liberals" could not abide the use of state power to help bring about reform. Instead, they exhorted captains of industry to address the widening gulf between labor and capital.[109] Not surprisingly, these urgings produced more expiation than reform, and it fell to Gilded Age protest movements to write the first serious chapter on the significance for an industrialized America of the distributive and enabling dimensions of constitutional discourse about labor and property.[110]

Gilded Age radicals saw a new class of capitalists arrogating to itself the tools of industry, transportation, communication, and finance; monopolizing the nation's resources; and corrupting its laws and polities. To these agrarian reformers, the power of "organized wealth" had arrayed itself against "the rights of the great plain people, as vouchsafed by the constitution."[111] In scores of books and thousands of articles, they melded constitutional, sociological, and political-economic arguments calling for the democratization of a range of institutions—the banking and currency systems, corporations law, railroad regulation, and industrial relations. Their immediate audience was the movement's own constituents; their ultimate audience was Congress; the judiciary was merely a hindrance.[112]

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109. *See, e.g.*, Cooley, *supra* note 108, at 511, 515 (opposing legislation to protect and empower labor); Field, *supra* note 108, at 412-20 (urging worker ownership to head off dangerous clashes between corporations and government).

110. *See* Forbath, *supra* note 99.

111. FARMER'S ALLIANCE, Sept. 6, 1880, *quoted in* NORMAN POLLACK, THE JUST POLITY: POPULISM, LAW, AND HUMAN WELFARE 28 (1987).

112. *See, e.g.*, NORMAN POLLACK, THE HUMANE ECONOMY: POPULISM, CAPITALISM, AND DEMOCRACY (1990); POLLACK *supra* note 111; O. Gene Clanton, *"Hayseed Socialism" on the Hill: Congressional Populism, 1891-1895*, 15 W. HIST. Q. 139 (1984).

This passage from an intricate economic and constitutional critique of the new corporate order by the 1892 Populist candidate for president conveys the sense of constitutional crisis: "Every class of business, every calling, everything except poverty, operates under a [corporate] charter. The poor must defend themselves as best they can, single-handed and alone. Competition and personal responsibility, except with the remaining multitude of the poor, are . . . annihilated by these monstrous combinations." JAMES B. WEAVER, A CALL TO ACTION 34 (Des Moines, Iowa, Iowa Printing Co. 1892). Combination as such was not the issue. As the leading labor-populist statesman and journalist, Henry Demarest Lloyd, put it, combination was the "fundamental element of the age"; equally important, however, was the "demand for social control." The first was "industrial; the second moral. The first promotes wealth; the second, citizenship." HENRY DEMAREST LLOYD, WEALTH AGAINST COMMONWEALTH 29 (Des Moines, Iowa, Iowa Printing Co. 1894). This juxtaposition of combination and social control did not imply belief in the presocial, natural, or purely "private" character of the processes of corporate consolidation. To the contrary, the Populists proved keen critics of the claim that consolidation followed the natural laws of economics.

Sunstein repeatedly quotes FDR's exhortation, "We must lay hold of the fact that economic laws are not made by nature. They are made by human beings," to show that with the New Deal, the Realist critique of status quo neutrality had entered popular constitutional discourse. Pp. 58, 322 (quoting Franklin D. Roosevelt, Speech Accepting the Nomination for the Presidency (July 2, 1932), *reprinted in* 1 PUBLIC PAPERS, *supra* note 76, at 657, 658). In fact, though, the critique arrived a half-century earlier. FDR's description of economic laws as man-made was already a favorite phrase of Gilded Age reformers who used it in thousands of lectures and articles delineating how the nation's courts were radically remaking common law and equity doctrine in order to allow the consolidation process to go forward. With the connivance of the courts, the corporate consolidators were rewriting corporations law to pursue their own goals and interests. There simply were no "natural" laws dictating the course of commercial and industrial development, and the courts betrayed the Constitution by empowering the corporate elite to control that development, to shape the industry and commerce, indeed, the very geography of the nation, in their particular interests. *See* Gerald Berk, *Constituting Corporations and Markets: Railroads*

Key functions of government, these radicals declared, had been given over to private corporations and "leased to associated speculators."[113] Corporate interests were reorganizing the economy to subvert the constitutional rights of free laborers—rendering them unfit for citizenship by reducing industrial workers into wage slavery and dispossessing broad masses of the nation's farmers.[114]

Here, the grand constitutional narrative typically recurred to Reconstruction. The Civil War, reformers explained, had broken "the chains of chattel slavery and prepared the way for the complete triumph over those who lived by the enslavement of labor."[115] But the nation's "political leaders . . . surrendered to a handful of task masters of another type," whose oppressions "have never been limited by distinctions of race or complexions of skin."[116] As a result, freedmen and women received only "the husk of liberty," and "the children of toil, both black and white," remained in chains.[117]

Accordingly, the Gilded Age social movements stood for a "new emancipation"[118] of free labor, but they saw themselves as heirs to the twin Reconstruction ideals of racial and economic justice. By uniting the "People" against the "Plutocrats" who would divide them along racial and ethnic lines, they aimed to extend the logic of Reconstruction to "Reconstruct . . . the whole Social 'System.' "[119]

The Reconstruction amendments had nationalized the rights of citizenship. But securing those rights in an industrialized America, reformers said, meant "engraft[ing] republican principles on property and industry."[120] Reformers called on Congress and state legislatures to launch public works and other forms of countercyclical spending to cushion downswings in the business cycle, to abolish the labor injunction and the harsh common law restraints on workers' collective action, and to aid workers and farmers in creating consumer and producer cooperatives.[121] Finally, reformers sought to halt the ascent of

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in Gilded Age Politics, 4 STUD. AM. POL. DEVEL. 130 (1990); Forbath, Anti-Monopoly Alternative, *supra* note 91.

113. WEAVER, *supra* note 112, at 5.

114. *See id. passim.*

115. *Id.* at 35.

116. *Id.*

117. *Id.* at 20.

118. *Id.* at 36.

119. Ira Steward, *Poverty,* 9 AM. FEDERATIONIST 159, 160 (1902). For a characteristic attack on plutocrats for seeking to divide labor through "cant of race," see GEORGE E. MCNEIL, THE LABOR MOVEMENT: THE PROBLEM OF TODAY 461 (Boston, A.M. Bridgman 1886); *see also* Thomas E. Watson, *The Negro Question in the South,* 6 ARENA 540 (1892), *reprinted in* THE POPULIST MIND 360 (Norman Pollack ed., 1967):

> Now the People's Party says to these two men [the black and white tenant farmer], "You are kept apart that you may be separately fleeced of your earnings. You are made to hate each other because upon that hatred is rested the keystone of the arch of financial despotism which enslaves you both. You are deceived and blinded that you may not see how this race antagonism perpetuates a monetary system which beggars both."

Id. at 371-72.

120. MCNEIL, *supra* note 119, at 462.

121. *See, e.g., Northern Alliance,* 6 POL. SCI. Q. 293 (1891); *St. Louis Demands,* NAT'L ECONOMIST, Dec. 21, 1889, at 214, 214-17. *See generally* FORBATH, *supra* note 51.

the giant corporation as the nation's chief vehicle of capital accumulation, and to democratize and decentralize the country's financial system.[122]

Countless Gilded Age reform platforms repeated this general program, culminating with the founding of the People's (or Populist) Party in the early 1890s.[123] Unified by the ideal of "redeeming the republic" through cooperation and equal rights, the program was not only the stuff of books, pamphlets, and politicians' stump speeches; it was mooted by thousands of movement lecturers and educators in union halls, churches, and farmers' encampments throughout the nation.[124]

The vision's defenders assumed a burden at once normative and practical. They argued both that the Constitution demanded economic reforms and that the reforms would work: The new legal and institutional order they envisioned would improve the lot of ordinary citizens, black and white. It would free the "Colored Tenant [farmer]" and the "White Tenant" from the "iron rule of the Money Power,"[125] and would ensure for industrial workers the "right to a remunerative job."[126] Through cooperation or robust unions, it also would restore to the latter the rights and responsibilities of control over productive property, thereby reconstituting republican citizenship.[127]

Thus, like Sunstein and many of today's constitutional liberals, labor and agrarian spokespeople rejected the prevailing view that constitutional liberties were only "negative." Theirs was a "positive" constitutional order, but a very different one from Sunstein's. Instead of focusing on welfare entitlements, Gilded Age radicals sought more complex and autonomy-enhancing institutional reforms to secure the constitutional norms of decent livelihoods, independence, responsibility, and remunerative work.

By mobilizing unprecedented numbers of citizens around a transformative constitutional vision, the Gilded Age radicals came remarkably close to producing what Bruce Ackerman calls a "constitutional moment."[128] But, as Ackerman points out, the Democratic-Populist defeats in the critical election of 1896 sealed the fate of Populism as a social force. The period became, in Acker-

122. *See, e.g.*, Harry Tracy, *The Sub-Treasury Plan, in* THE FARMER'S ALLIANCE AND AGRICULTURAL DIGEST 336 (Nelson Dunning ed., Washington, D.C., Alliance Publishing 1891); *The Money Trust*, NAT'L ECONOMIST, Jan. 11, 1890, at 270; *What of Our Future?*, AMER. NONCONFORMIST, July 7, 1897, at 2.

123. *See, e.g.*, CONSTITUTION OF THE KNIGHTS OF LABOR, *reprinted in* MCNEIL, *supra* note 119, at 459; *Northern Alliance*, *supra* note 121; *The Omaha Platform*, NAT'L ECONOMIST, July 9, 1892, at 1; *St. Louis Demands*, *supra* note 121.

124. *See* LEON FINK, WORKINGMEN'S DEMOCRACY: THE KNIGHTS OF LABOR AND AMERICAN POLITICS (1983); LAWRENCE GOODWYN, DEMOCRATIC PROMISE: THE POPULIST MOMENT IN AMERICA (1976); Forbath, Labor-Populist Constitution, *supra* note 91; *see also* FORBATH, *supra* note 51, at 135-137.

125. THOMAS E. WATSON, THE PEOPLE'S PARTY PAPER (1892), *reprinted in part in* THE POPULIST MIND, *supra* note 119, at 374, 375.

126. The phrase "right to a remunerative job" appears in, inter alia, *The Causes of Financial Crashes, Labor Strikes, and Tramps*, AMER. NONCOMFORMIST & KANS. INDUST. LIBERATOR, Apr. 7, 1887, at 1; *Hard Times*, SO. MERCURY, Apr. 11, 1889, at 1; *Resolution of Shawnee County Alliance*, ADVOCATE, Mar. 16, 1894, at 1.

127. *See generally* Forbath, Anti-Monopoly Alternative, *supra* note 91.

128. *See* ACKERMAN, *supra* note 2, at 6-7.

man's view, a "failed constitutional moment," exercising a residual influence on future constitutional discourse, but no more.[129]

I argue below that if one looks beyond the courts for one's constitutional texts, one in fact finds a far more lasting legacy. Moreover, to attribute normative and hermeneutic authority, as Ackerman does, to an outcome traceable more to the force and guile of the radicals' foes than to democratic processes is troubling. Terror, violence, and massive disenfranchisement of African-Americans and poor and working class whites in the North and South alike played a critical part in defeating the reform enterprise. So did racism among the movement's white constituencies. Racist and antiimmigrant appeals helped convince white voters to abandon inclusive equal rights ideals in favor of an older identity rooted in the image of "free white labor." They were less persuaded than bought off, in W.E.B. DuBois' evocative phrase, by the "psychological wage of whiteness."[130]

2. *Positive rights, distributive norms, and social citizenship in the twentieth century.*

The Progressives. As the Populist moment passed, the movement's commitment to multiracial democracy—always fragile and ambivalent on the part of whites—became a dissenting tradition within the tradition of dissent, shunted out of the mainstream of reform ideals by the increasingly virulent racism of white America in the first decades of the twentieth century. However, the Populists' vision of economic justice and an alternative industrial America continued to shape mainstream reform discourse into the Progressive era and beyond. Progressives like Louis Brandeis carried these aspects of Gilded Age radicalism into this century. For Brandeis and other Progressives, the nation's industrial and economic orders remained fraught with constitutional infirmities. What the Populists and labor radicals did for agrarian and working class movements, Progressive thinkers like Brandeis and John Dewey did for later middle-class and elite reformers: They interpreted the emergence of big business and corporate capitalism in terms of an inherited democratic constitutional tradition, and, in doing so, limned a vision for the future.[131]

The key object of law and government, Brandeis held, in good republican fashion, was sustaining a politically and economically independent citizenry. The Constitution must safeguard not only a framework of government, but also the project of fitting citizens for "their task" of self-rule.[132] Vincent Blasi has written eloquently about aspects of this republican vision in Brandeis' First

129. *Id.* at 84, 101, 111; *see also* Bruce A. Ackerman, *Liberating Abstraction,* 59 U. CHI. L. REV. 317, 340 n.74 (1992).

130. DUBOIS, *supra* note 45, at 701; *see also* GOODWYN, *supra* note 124; ROBERT C. MCMATH, JR., AMERICAN POPULISM: A SOCIAL HISTORY, 1877-1898 (1993).

131. *See* ROBERT B. WESTBROOK, JOHN DEWEY AND AMERICAN DEMOCRACY 429-62 (1991); text accompanying notes 132-143 *infra.*

132. Louis D. Brandeis, Address at Fanueil Hall, Boston (July 4, 1915), *in* LOUIS D. BRANDEIS, BUSINESS—A PROFESSION 364, 366 (1933).

Amendment jurisprudence,[133] and others have underscored how republicanism found expression in Brandeis' famous views on federalism.[134]

Less prominent in Brandeis' judicial opinions, but perhaps more central to his constitutional vision, was the ambitious conception of industrial and economic democracy forged during his career as a reformer. No more than his grittier counterparts in the labor movement did Brandeis expect the courts to enact this vision, but in this era, that took nothing away from its constitutional moorings. For all their differences, most Progressive reformers agreed that their time was one of constitutional crisis. The courts, they said, were defending one constitutional order—"static," "formal," "authoritarian," "aristocratical," and the reformers were struggling to advance another—"evolving," "experimental," "democratic."[135] Today, we remember the restraint the Progressives demanded of the judiciary.[136] We tend to forget, however, the affirmative obligations their vision laid on the other branches of government.

The "constitutional protections of life and liberty," Brandeis declared in a widely published 1915 address at Boston's Fanueil Hall, were "now being interpreted according to demands of social justice and of democracy"; all Americans "must have a reasonable income" and "regular employment"; "they must have health and leisure," "decent working conditions,"[137] and "some system of social insurance."[138] However, the "essentials of American citizenship are not satisfied by supplying merely the material needs or even the wants of the worker."[139]

Meeting those needs and wants was necessary, but mostly as a means to an end. As Brandeis told the United States Commission on Industrial Relations that same year: "[W]e are committed primarily to democracy."[140] Thus, every citizen "must have education—broad and continuous."[141] But even this would not outfit Americans for republican self-rule, if the broad mass of wage-earners did not enjoy a measure of "[i]ndustrial liberty"[142] as well as political liberty.

There could be no more "political democracy" in contemporary America, Brandeis told the Commission, without "industrial democracy," without workers' "participating in the [business] decisions" of their firms—with "not only a voice but a vote; not merely a right to be heard, but a position through which

133. *See* Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in* Whitney v. California, 29 WM. & MARY L. REV. 653 (1988).

134. *See, e.g.*, PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 172-73, 395 (1984).

135. A compelling example of the rhetoric drawing these contrasts is HERBERT DAVID CROLY, PROGRESSIVE DEMOCRACY 132, 136, 138, 250-52, 149-50, 164-65 (1915).

136. *See* Clyde Spillenger, *Reading the Judicial Canon: Alexander Bickel and the Book of Brandeis*, 79 J. AM. HIST. 125, 132-38 (1992).

137. Brandeis, *supra* note 132, at 367.

138. *Id.* at 370.

139. *Id.* at 367-68.

140. Louis D. Brandeis, Statement to United States Commission on Industrial Relations (Jan. 23, 1915), *in* LOUIS D. BRANDEIS, THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS 70, 73-74 (Osmond K. Fraenkel ed., 1935).

141. Brandeis, *supra* note 132, at 368.

142. *Id.* at 369.

labor may participate in management."[143] Only by bringing constitutional democracy into industry could the United States produce not only goods but citizens.

Virtually every Progressive era industrial reformer and reform organization relied on the language of constitutionalism. Whether they were championing collective bargaining between employers and trade unions, or other reform visions—government ownership, producers' cooperatives, labor copartnership—almost all employed some version of the argument that "arbitrary government" must be abolished and industry "constitutionalized."[144]

The labor movement also continued to cast its attacks on "industrial autocracy" in boldly constitutional terms. The "right of labor to have a voice in the industrial world" was the fundamental question of the industrial conflict, editorialized the *Iron Molders' Journal*. "Political equality is not sufficient and unless the wage-earner possesses an industrial equality that places him on a par with his employer there can never exist that freedom and liberty of action which is necessary to the maintenance of a republican form of government."[145] Workers' rights to associate, assemble, unionize, and strike were First, Thirteenth, and Fourteenth Amendment claims repeatedly spurned by the courts that labor brought again and again to Congress and state legislatures, until finally Congress inscribed them in the Norris-LaGuardia and Wagner Acts of the 1930s.[146]

The New Deal and after. Likewise, the politicians, lawyers, scholars, and labor leaders who shaped the New Deal understood reform to entail not merely economic recovery, but redeeming workers' rights and identities as citizens.[147] Thus, the Legal Realist Robert Hale told the Senate Committee on Education and Labor in 1934 that the situation of an employee at a nonunion steel plant was akin to that of a "non-voting member of a society."[148] And at the same hearing, Senator Robert Wagner attacked the existing legal order for "perpetuating in modern industry . . . aspects of a [feudal] master-servant relationship." As citizens, workers deserved "real opportunities to participate in the determination of economic issues."[149] Echoing labor's half-century-old refrain, Wagner concluded that "industrial tyranny" was "incompatible with a republican form of government."[150]

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143. Brandeis, *supra* note 140, at 78-79.

144. *See, e.g.*, MILTON DERBER, THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY, 1865-1965, at 136-74 (1970); WALTER E. WEYL, THE NEW DEMOCRACY 164 (1912); *Democracy, in* THE ENCYCLOPEDIA OF SOCIAL REFORM 481, 482-86 (William D.P. Bliss ed., New York, Funk and Wagnalls 1897); Howell J. Harris, *Industrial democracy and liberal capitalism, 1890-1925, in* INDUSTRIAL DEMOCRACY IN AMERICA: THE AMBIGUOUS PROMISE 43 (Nelson Lichtenstein & Howell John Harris eds., 1993).

145. 40 IRON MOLDERS' J. 750, 750 (1904) (untitled editorial).

146. *See* FORBATH, *supra* note 51.

147. A splendid recent work confirming the centrality of this aspect of New Deal policies is Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379 (1993).

148. *To Create a National Labor Board, 1934: Hearings on S. 2926 Before the Comm. on Educ. and Labor*, 73d Cong., 2d Sess. 51 (1934) (statement of Robert L. Hale, Professor of Law, Columbia University).

149. *Id.* at 24 (remarks of Senator Wagner).

150. *Id.* at 29.

Although their specific visions of reform varied greatly, participants in this tradition, from Radical Republicans to Gilded Age Populists to New Dealers like Senator Wagner, all tried to recover for industrial America the eighteenth century understanding that constitutional discourse properly addressed the social and economic bases of citizenship. The Constitution did more than limit the power of laws and government over society; it was also a Constitution of society and required that laws and government sustain the citizenry's individual and collective capacities for self-rule.

For a moment, FDR and the New Deal appeared finally to have enshrined social and economic rights in the United States. Construed by Sunstein solely in terms of welfare entitlements and social insurance, as we have seen, FDR's "second Bill of Rights" actually wedded that twentieth century ideal of generous social provision to an older, antimonopoly, republican tradition, with its emphasis on decent work and active, character-forming participation in economic life. But of course, the New Deal's institutional legacy fell far short of this panoply of social and economic rights, and FDR's broad rights rhetoric fell into disuse as, after World War II, the labor movement came to depend on the "private welfare state" that unions constructed for workers in core sectors of the economy through collective bargaining. This development combined with the long postwar prosperity to make the language of social and economic rights sound like special pleading by advocates for the "undeserving poor," just as affirmative action emerged as a precarious "positive" extension of the generally "negative" repertoire of constitutional rights.

Forgotten was the long-standing ideal of a broadly substantive constitutional order, in which the promise of equal rights would underpin both racial justice and a rough measure of economic security, independence, and decent work for all. As a result, affirmative action has had to address the constitutional injuries of caste for black Americans, while they have lacked a constitutional rhetoric and redress against the overlapping injuries of class shared by poor and working-class blacks and whites alike.

Caste, of course, is bound up with degraded, marginalizing work and lack of work. Caste relegated African-Americans to slavery, then excluded them from many callings, and continues to operate today. But caste also works in tandem with class inequality, reinforcing those social and political processes that produce degraded and marginalizing work and lack of work without regard, in the Populists' words, to "distinctions of race or complexions of skin." Forgetting that this kind of class-based degradation is also a constitutional wrong has made affirmative action more inadequate and vulnerable than it need be.

Here, as ever, broad social and economic rights are indispensable. The "full emancipation and equality of Negroes and the poor," wrote Martin Luther King, Jr., in 1967, demands a "contemporary social and economic Bill of Rights," and King's Bill, like FDR's, emphasized decent incomes, education,

housing—and "full employment."[151] As a popular placard at the 1963 March on Washington pithily stated, "Civil Rights + Full Employment = Freedom."[152]

III. REINVENTING RIGHTS TALK

Why has the nation repeatedly avoided reckoning with the widely acknowledged positive dimensions of the equal rights tradition? There are many answers. In part, this two-century-old drama of acknowledgement and avoidance has been shaped by the realities of American abundance and the myth that economic opportunity and security are there for the taking. As suggested above, the force and guile of the opponents of radical reform also have proved central. So, too, have racism and ethnic and gender antagonisms. Often, throughout this history, white, native-born, male farmers and workers proved ready to spurn inclusive equal rights politics and ideals in favor of an older identity rooted in the image of the "free white workingman."

The cultural and institutional residue of nineteenth century defeats of the radical impulse, moreover, left the twentieth century heirs of those ideals ill-equipped for later battles. Thus, for example, the defeat first of Reconstruction and then of Populism in the South, and the ensuing disenfranchisement of blacks and poor whites, engendered a Southern Democratic Party that stoutly opposed generous and universal forms of social insurance in the New Deal in order to maintain white supremacy and black (and white) serfdom in the Southern economy.

Finally, dominant constitutional discourse itself has shaped Americans' rights consciousness. We continue to speak of rights as negative and redeemable in the courts, and so struggle to fit social and economic rights into the lexicon. We should be grateful, then, to Professor Sunstein for his thoughtful assault on that discourse. But there is more to do.

Today, not only is the nation's economic order once again in flux, but the key institutions for ensuring a measure of economic equity and workplace democracy have broken down. The New Deal labor laws now protect the rights of precious few workers, and the labor movement is dying on its feet. As noted above, economic inequality has grown dramatically, and many foresee worsening prospects for broad swaths of the population. At last, the Clinton Administration has focused public debate on these issues.

Yet despite the rhetoric about job creation, public investment, and human capital, any talk of rights, or, indeed, any clear normative discussion remains strikingly absent. To be sure, the President, the Democratic Party, and others

151. MARTIN LUTHER KING, JR., WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY? 163, 193, 200 (1967). Insisting, on one hand, that "full employment" for inner city black youths could not be accomplished without special programs, nor for other black Americans without vigorous affirmative efforts to end discrimination, *id.* at 196-97, on the other hand, King also underscored that this conception of rights was not a " 'civil rights' program in the sense that that term is currently used. . . . [It] would benefit all the poor including [the majority] of them who are white." *Id.* at 165. For a prominent contemporary African-American voice arguing along similar lines, see CORNEL WEST, RACE MATTERS 61-68 (1993).

152. EYES ON THE PRIZE: PART 6 (PBS television documentary, 1987).

express concern over unemployment, unacceptable work conditions, and lack of medical care. Still, the absence of any exigent normative views about social and economic reform is new and disturbing. If we continue to frame political debate about jobs, health care, and other aspects of equal citizenship only in terms of "the budget" and "sound policy," it seems safe to expect the status quo will go largely undisturbed. No public, no social movement, will mobilize against it: People mobilize around rights, not human capital policy. Every previous generation of reformers addressed its task in the language of citizenship and rights, as well as of budgets and policies. We have learned to be leery of high-sounding rights talk; we have not learned to do without it.

Why is this rights talk, which I have described, different from other recent rights talk? First, it forthrightly addresses the polity more than the courts. Second, it acknowledges the limitations of entitlements-based strategies in securing positive rights. It does not abandon those strategies, but stresses institutional reform. Third, this rights talk contains a vision of citizenship that includes norms of responsibility and self-reliance, but recognizes that these virtues must be fostered by enabling rights to education, training, and decent work, as well as other forms of social provision.

Finally, this rights talk rejoins the broken constitutional link between economic and racial justice. Its norms and narratives may, as I have tried to suggest, supply bases for common identity and cooperation among groups that today's rights talk often only divides.

Plainly, no constitutional theory or theorist can animate such rights talk alone. And perhaps, as many believe, the very Americans who might benefit most from these ideas are too jaundiced, too paranoid, or too despairing to commit to large public undertakings. Still, part of a theorist's job is to imagine the furthest possibilities lying fallow in the present and the past and the Constitution of a future that brings them to light. This, again, Professor Sunstein—partially—has begun.